

Section 65, Block 3, Lot 13

TOWN OF NEWBURGH: COUNTY OF ORANGE
ZONING BOARD OF APPEALS

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In the Matter of the Application of

DANIEL HESIDENCE¹

DECISION

For area variances as follows:

- *Grant of a variance allowing a rear yard setback of 4.3 feet where 40 feet is required;*
- *Grant of a variance allowing a side yard setback of 0 feet where a minimum of 15 feet is required;*
- *Grant of a variance allowing a combined side yard of 7.4 feet where a minimum of 30 feet is required;*
- *Grant of a variance allowing a lot building coverage of 3,987 square feet where 2,952 square feet is the maximum square footage permitted.*

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Introduction

Daniel Hesidence seeks area variances as follows: (1) An area variance allowing a rear yard setback of 4.3 feet where 40 feet is required; (2) An area variance allowing a side yard setback of 0 feet² where a minimum of 15 feet is

¹ The variances requested herein, with only very slight modification, were issued by this Board on April 22, 2010. Pursuant to Town Code section 185-55 the variances previously issued lapsed and this new application – for essentially the same variances – ensued.

² A portion of the building on the premises under consideration encroaches upon adjacent property to the east. This condition appears to be allowed pursuant to a provision contained in the adjoining property owner's deed.

required; (3) An area variance allowing a combined side yard of 7.4 feet where a minimum of 30 feet is required and (4) An area variance allowing a lot building coverage of 3,987 square feet where 2,952 square feet is the maximum permitted.

The property is located at 28 Waring Road in the R-3 Zoning District and is identified on the Town of Newburgh tax maps as Section 65, Block 3, Lot 13.

A public hearing was held on February 28, 2013, notice of which was published in *The Mid-Hudson Times* and *The Sentinel* and mailed to adjoining property owners as required by Code.

Law

Section 185-11 of the Code of Ordinances of the Town of Newburgh [Zoning], entitled "Utilization of Bulk Table," requires compliance with the bulk regulations set forth in the bulk and use schedules set forth within the zoning ordinance.

These schedules require, for this property in the R-3 Zoning District, a rear yard setback of 40 feet; a side yard setback of 15 feet; a combined side yard of 30 feet; and a maximum lot building coverage of 15% (2,952 square feet).

Background

After receiving all the materials presented by the applicant and hearing the testimony of the applicant at the public hearing held before the Zoning Board of Appeals on February 28, 2013, the Board makes the following findings of fact:

1. The applicant is the owner of a 0.45± acre lot (tax parcel 65-3-13) located at 28 Waring Road.

2. The lot is improved by a concrete block building. A portion of this building encroaches upon lands to the east. This condition appears to pre - date zoning and is apparently allowed by a recorded instrument encumbering the burdened parcel to the east.³
3. The applicant now proposes to occupy this concrete block building as his principal residence. This use is permitted in the R-3 zone.
4. As noted hereinabove, area variances are required for rear yard, side yard, combined side yard and lot building coverage.
5. The applicant's proposal is set forth on a series of photographs and a boundary survey prepared by Darren J. Stridiron, PLS dated September 23, 2011. Those photographs and survey are hereby incorporated into this decision and a set shall remain in the zoning board's file in this matter.
6. The required, existing and proposed dimensions (in feet) and the extent of the variances requested are as follows:

Bulk Requirement	Allowance	Existing	Proposed	Variance	Percentage
Rear Yard Setback	40'	4.3'	4.3'	35.7'	89.3%
Side Yard Setback	15'	0'	0'	15'	100%
Combined Side Yard	30'	7.4'	7.4'	22.6'	75.5%
Lot Building Coverage	2,952 S.F.	3,987 S.F.	3,987 S.F.	1,035 S.F.	35.0%

³ The following note appears on the survey of the subject premises presented by the applicant: "Flannery's deed [the property adjoining to the east] L.1653 p.982 excepts "that part or portion of the said lots on which there is a lavatory and/or wash room which is attached to and forms a part of the contiguous building formerly used as an iron fabrication shop." While the Board is not in position to establish the validity of this note, there was no challenge made to this representation and the Board assumes, for purposes of this decision, it is accurate.

7. An adjoining neighbor spoke at the public hearing. The point of this adjoining neighbor's comment was, essentially, that Mr. Hesidence would not be allowed to enter upon the adjoiner's property to gain access to, or perform work upon, any structures that abutted the adjoiner's property.
8. The Building Inspector denied a building permit application by letter dated January 24, 2013.

The applicant has appealed the Building Inspector's determination.

After hearing the testimony at the public hearing and considering the materials received by the Board and after viewing the subject site, the Board decides as follows:

SEQRA

This matter constitutes a Type II action under the State Environmental Quality Review Act inasmuch as it involves the granting of an area variance(s) for a single-family, two-family or three-family residence [6 NYCRR §617.5(c)(13)]. As such, this project is not subject to review under the State Environmental Quality Review Act.

GML 239 Referral

This application is not required to be referred to the Orange County Planning Department for review.

Findings

In reviewing the facts presented for the requested area variances, the

Board considered the five standards for determining whether the applicant has sustained its burden of proof as required by Town Law Section 267-b (3). Each factor has been considered relevant to the decision of the board of appeals, but no single one is viewed as precluding the granting of the variances.

(1) Undesirable Change—Detriment to Nearby Properties

The property in question is improved by an existing block building. This building appears to have existed for some time, perhaps for more than 50 years, but in any event prior to the adoption of zoning in the Town of Newburgh. The structure is unique in that it appears to have been built as an accessory structure, not as a structure housing a principal use.⁴ A prior request to use this existing structure as a commercial storage facility was denied by this Board.⁵

The current request is to use the building as a residential home. This use is allowed in the R-3 zone. The applicant and his representatives testified at the hearing that the home would be in harmony with this existing, mature, neighborhood and would not in any way result in any undesirable changes to the neighborhood nor cause any detriment to any nearby properties.

No contrary evidence or testimony was submitted to Public Hearing.

Absent any testimony or evidence indicating such, the Board cannot conclude that any undesirable change in the character of the neighborhood or detriment to the neighbors in that neighborhood will result if the requested variances are granted.

⁴ In a prior application regarding this property, not involving the current applicant, there was contradictory testimony taken as to whether the structure was used for commercial or residential storage. (see *In the Matter of the Application of Coatti*, decided by this Board in November of 2006.) There appears to be no question, however, that the building was used for storage only.

⁵ See *Coatti* decision referenced above.

Accordingly, based upon the evidence and testimony submitted to the Board, the Board finds that granting of the request of the area variances will not result in any serious, undesirable, detriment to surrounding property owners

(2) Need for Variance

Because the structure was constructed long before zoning was adopted in the Town of Newburgh, it is not feasible for the applicant to use the structure, for any purpose, including the purpose for which it is intended, without the variances requested herein.

(3) Substantial Nature of Variances Requested

The variances requested are substantial. However, the request for these variances must be viewed in the context of (a) the existing non-conformity of the structure on the lot and (b) the extent of the *variation* from that existing condition. Because the focus of the inquiry by the Zoning Board of Appeals is upon the character of the neighborhood in question, we believe, under the circumstances presented here, that the substantial nature of the variances requested does not prohibit the Board from granting this application because there will be no variation from the existing footprint resulting from this grant of the variances herein requested.

(4) Adverse Physical & Environmental Effects

No testimony was given, nor was any evidence provided, that would indicate that issuance of the requested variance would result in any adverse physical

and/or environmental effects. The applicants testified that no such effect would occur.

Based upon the evidence and testimony submitted, the Board finds that issuance of the requested variance will not adversely impact the physical and environmental conditions in this neighborhood.

(5) Self-Created Difficulty

The need for this variance is clearly self-created in the sense that the applicant purchased this property charged with the knowledge of the existing non-conformity and while aware of the need to obtain variances in order to use the structure for any purpose.

However, because of the existing nonconformity and because it is not feasible to use the existing building without a variance or variances of some kind, the board believes, under the circumstances presented, that the self-created nature of the need for the variance requested does not preclude granting the application. Moreover, as noted earlier, no undesirable change in the character of the neighborhood will occur as the result of the granting of these variances.

Decision

In employing the balancing tests set forth in Town Law Section 267-b (3), the Board hereby determines that the applicant has satisfied the requisites of Section 267-b and grants the area variances as requested upon the following conditions:

1. There shall be no art studio or any commercial enterprise of any kind operated or undertaken at the premises

2. The variances hereby granted are granted for the purpose of authorizing construction of what is shown on the plans or described within the application materials only. No construction other than as shown or described (architectural refinements aside) is authorized by this decision.

3. Section 185-55 [Procedure; construal of provisions; conflict with state law] of the Code of Ordinances of the Town of Newburgh provides, in subdivision "D," that this grant of variance shall become null and void at the expiration of six months from issuance, unless extended by this board for one additional six-month period.

Dated: February 28, 2013



Grace Cardone, Chair
Town of Newburgh ZBA

By roll call a motion to adopt the decision was voted as follows:

AYES: Chair Grace Cardone
Member Brenda Drake
Member John McKelvey
Member James Manley
Member Michael Maher
Member John Masten
Member Roseanne Smith

NAYS: None

ABSENT: None

STATE OF NEW YORK)
)ss:
COUNTY OF ORANGE)

I, BETTY GENNARELLI, Secretary to the Zoning Board of Appeals of the Town of Newburgh, do hereby certify that the foregoing is a true and exact copy of a Decision maintained in the office of the Town of Newburgh Zoning Board of Appeals, said resulting from a vote having been taken by the Zoning Board at a meeting of said Board held on February 28, 2013



BETTY GENNARELLI, SECRETARY

TOWN OF NEWBURGH ZONING BOARD OF APPEALS

I, ANDREW J. ZARUTSKIE, Clerk of the Town of Newburgh, do hereby certify that the foregoing Decision was filed in the Office of the Town Clerk on
APR 26 2013



ANDREW J. ZARUTSKIE, CLERK

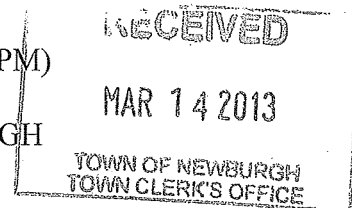
TOWN OF NEWBURGH

ZBA MEETING – FEBRUARY 28, 2013

(Time Noted – 7:16 PM)

DANIEL HESIDENCE

28 WARING ROAD, NBGH
(65-3-13) R-3 ZONE



Applicant is seeking area variances for the rear yard setback, one side yard setback, the combined side yards setback and the maximum lot building coverage to convert a garage to a 1-Family residence.

Chairperson Cardone: Our next applicant Daniel Hesidence.

Ms. Gennarelli: This applicant sent out thirty registered letters, I have three that were returned and the other envelope that was sent to me was not has not arrived yet from Long Island City so...the mailings were in order, all mailings and publications are in order. (The envelope, containing all the other returned green cards, was delivered by the Post Office on 3-1-2013 which contained twenty-one green cards - in total twenty-four were returned).

Mr. Hesidence: My name is Daniel Hesidence. I am seeking an area variance for one and combined side yards setback, the rear yard setback, maximum lot building coverage to convert a vacant garage to a single-family residence. In 2010 I purchased this property once the ZBA granted all area variances and permission to convert this garage to a single-family residence. As I began to move forward unexpected financial challenges presented themselves impacting my budget and timeline. Because my application has since expired I'm here to reapply. No changes to the existing footprint of this structure will be made. The building was built as an ironworks factory in 1930 I would like to convert it to a single-family residence.

Ms. Drake: Can you just...can you tilt the microphone up a little bit?

Mr. Hesidence: Sure.

Ms. Drake: Thank you. I believe there were some issues with some tanks and those have been resolved between the two parcels?

Mr. Hesidence: Those have been resolved.

Chairperson Cardone: And the plan is the same plan that you submitted in the past?

Mr. Hesidence: It's...it's the same footprint there's a change internally. One of the bedrooms has been taken out because financially I can't afford to put it in.

Mr. McKelvey: Which bedroom?

Mr. Hesidence: Pardon me?

Chairperson Cardone: On the first floor?

Mr. McKelvey: The first floor?

Mr. Hesidence: On the first floor, yes.

Ms. Smith: It's going to remain a one-family residence with no business conducted from that?

Mr. Hesidence: That's correct.

Chairperson Cardone: So essentially it's because the Permit you had expired, the variance you had expired and so that's why you are coming back?

Mr. Hesidence: That's correct.

Chairperson Cardone: Okay. Do we have any other questions from the Board? Any questions or comments from the public?

Mr. Sottile: Ed Sottile, 30 Waring Road...

Ms. Gennarelli: Can you turn that up a little bit towards you so we can hear you? That's good.

Mr. Sottile: How's that better?

Ms. Gennarelli: Just get closer.

Mr. Sottile: Ed Sottile, 30 Waring Road, I happen to be his neighbor with the tank issues and we won't go into that...

Chairperson Cardone: Right.

Mr. Sottile: ...but the only thing I want to ask is that a...he does plan on doing some exterior work to this building I would imagine and I'd like to know how he's going to access the side of the building on the property because this building a...on my end is the property line.

Mr. Maher: So I'm assuming you're not willing to give him access to the property?

Mr. Sottile: Correct.

Chairperson Cardone: Any other comments from the public?

Mr. McKelvey: Does the owner of the property want to answer that question that he gave?

Mr. Hesidence: Well I'm hoping, you know, I own the property I'm hoping I have the right to maintain my own property just as they have a building that's right up against my property line, they have the right to maintain their building. This building has been in existence for over eighty years.

Mr. Sottile: Mr. Hesidence bought this property what in 2010 I believe?

Chairperson Cardone: Correct.

Mr. Sottile: He had it looked at presumably? He knew the issues with it and he bought it anyway. Okay? My house does not sit on his property line. I can walk around my house. He doesn't have that privilege and a...he knew that going into this. It's a buyer beware situation. I don't want people on my property that's the way it is.

Mr. Maher: So let me ask you a question, according to the survey that's filed here the existing stone garage...I'm assuming is on your property?

Mr. Sottile: The property line goes around the building.

Mr. Maher: Well by (9) nine inches obviously. I find that hard that you could walk around (9) nine inches around the building there but regardless...

Mr. Sottile: The...the property stakes that have been put down there by many surveyors that have come in have put these stakes right up against the building...

Mr. Maher: Against your building?

Mr. Sottile: Against his building.

Mr. Maher: No, no I'm referring to yours right now.

Mr. Sottile: Oh, go ahead, I'm sorry.

Mr. Maher: So it shows a (9) nine inch clearance around the building...

Mr. Sottile: Oh, that's my garage.

Mr. Maher: Right, no I understand that, that's what I said...the stone garage...

Mr. Sottile: Right.

Mr. Maher: So basically you have no access to the side of your garage, he has no access to the side of his house...I mean that...

Mr. Sottile: I don't need to get to my garage, the side of my garage, it's a stone wall.

Mr. Maher: And you're...and you're happy with the current looks of the building and you're willing to remain like that?

Mr. Sottile: I have no problem with it.

Mr. Maher: Okay.

Mr. Donovan: If I can just kind of orient the Board in terms of what you do when you have a variance that's been granted by the Board? That essentially the same application comes back to the Board because this is except for some very minor changes a variance of (7.2) seven point two feet instead of (7.4) seven point four and (4) four feet instead of (4.3) four point three otherwise it's the same variance we granted in April of 2010. Absent any material change in circumstance we are duty bound, this Board is duty bound to follow its prior decision.

Mr. Manley: Yeah, I don't believe that there's anything that has been significant that's been uncovered in these proceedings which would cause this Board to, you know, overturn its decision. There has been nothing new presented that would prevent us from...to change our decision. I think that one of the big complaints that we have had prior to this building undergoing a transformation was the fact that the prior commercial building had a lot of people that were outside, were using it for a bathroom and you know, I think that really detracted from the neighborhood. I think that this particular change is going to a...increase the individual's property values in the neighborhood. Baring that I also took the liberty of pulling in the area any other requests that neighbors had made for variances and there are a number of requests for variances that were granted by the Board. So this gentleman's request for a variance is in character with the neighborhood which is part of the decision process when a Board makes its determination. I also found some, to my surprise, that there were a number of Violations and open Building Permits for neighbors in the neighborhood that have never been closed out and are in Violation. So there are issues in the neighborhood that I believe Code Compliance should probably look into and ensure that the neighborhood is...is complying with our Building Codes. But this gentleman has done everything he's been asked to, he has come before this Board twice now and I see no reason to deny the permit and the application.

Mr. Sottile: I'm not saying don't give him the variance if he wants it but I'm saying he has no access to the end of the building. He's not coming on my property, period.

Mr. Manley: That's your choice.

Mr. Sottile: Okay. The other thing is as far as any what you're referring to...any open Permits that haven't been closed or what not...people are still paying taxes on that land...on those changes. Aren't they? Six months after you have a Permit the tax goes enforced on what the changes were.

Mr. Manley: But you still have an obligation...

Mr. Sottile: Correct?

Mr. Manley: An individual would still have an obligation to close that Permit out.

Mr. Sottile: I'm not saying they don't but they are paying taxes on the changes.

Mr. Manley: And you also have to comply with the Law so it...it's a two-way street.

Mr. Sottile: I understand that.

Chairperson Cardone: Do we have any other comments from the public? Anything else from the Board?

Ms. Drake: I'll make a motion to approve the...to close the Public Hearing.

Mr. Maher: Second.

Ms. Gennarelli: Roll call.

John McKelvey: Yes

Brenda Drake: Yes

Michael Maher: Yes

James Manley: Yes

John Masten: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

(Time Noted - 7:25 PM)

ZBA MEETING – FEBRUARY 28, 2013 (Resumption for decision: 8:42 PM)

DANIEL HESIDENCE

28 WARING ROAD, NBGH
(65-3-13) R-3 ZONE

Applicant is seeking area variances for the rear yard setback, one side yard setback, the combined side yards setback and the maximum lot building coverage to convert a garage to a 1-Family residence.

Chairperson Cardone: On the next application Daniel Hesidence, 28 Waring Road, seeking area variances for the rear yard setback, one side yard setback, the combined side yards setback and the maximum lot building coverage to convert a garage to a 1-Family residence. This is a Type II Action under SEQRA. Do we have discussion on this application?

Mr. Maher: This is consistent with the last application before us with minor interior changes, the applicant has connected to sewer, I'll make a motion to approve.

Ms. Drake: Second.

Ms. Gennarelli: Roll call.

John McKelvey: Yes

Brenda Drake: Yes

Michael Maher: Yes

James Manley: Yes

John Masten: Yes

Roseanne Smith: Yes

Grace Cardone: Yes

Chairperson Cardone: The motion is carried.

PRESENT ARE:

- GRACE CARDONE
- JOHN MC KELVEY
- BRENDA DRAKE
- MICHAEL MAHER
- JAMES MANLEY
- JOHN MASTEN
- ROSEANNE SMITH

ALSO PRESENT:

- DAVID A. DONOVAN, ESQ.
- BETTY GENNARELLI, ZBA SECRETARY
- GERALD CANFIELD, CODE COMPLIANCE
- JOSEPH MATTINA, CODE COMPLIANCE

(Time Noted – 8:43 PM)

80 3/13/13